IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 4830 of 1987

For Approval and Signature:

HONOURABLE MR.JUSTICE K.A.PUJ

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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HARGOVINDBHAI P PATEL - Petitioner
Versus
D G P & 1 - Respondents

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Appearance :
MS SONAL SHAH for MR YN OZA for Petitioner.
MR LB DABHI, AGP for Respondents.

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CORAM : HONOURABLE MR.JUSTICE K.A.PUJ

Date : 17/01/2006

ORAL JUDGMENT

1.The petitioner has filed this petition under Article 226 of the Constitution of India praying for the direction to the respondents to promote the petitioner to the post of Police Inspector from 04.05.1985 and consider his case for future promotion and to confer upon him all consequential benefits.

2.The petition was admitted and rule was issued on 28.09.1987. The petition was ordered to be heard along with Special Civil Application No. 1407 of 1983. The Court has modified the interim relief and directed that promotions, if any of the juniors of the petitioner shall be subject to final decision of the petition.

3.Special Civil Application No. 1407 of 1983 was heard and decided by the Division Bench to which the reference was made and the Division

Bench vide its order dated 09.10.1990 has held that seniority-cum-merit is not the criterion for promotion to the post of Police Inspector (Unarmed) from the lower ranks of the Police Force. The correct criterion is “merit” as laid down in Rule 53 of the Gujarat Police Manual Volume – I which is enacted in exercise of the powers under Article 309 of the Constitution of India and published in Notification dated 10.01.1964. The Division Bench has also directed the office to place the matter before the Learned Single Judge for proceeding further in accordance with law. Accordingly, the Learned Single Judge of this Court has disposed of the said petition vide his order dated 26.10.1993 and it was observed therein that having regard to the facts and circumstances of the case and the view taken by the Division Bench of this Court in this petition, the petition deserves to be dismissed. The petitioner was not entitled to

be considered for the post of Police Inspector.

4.It is the case of the petitioner that in 1985, when the promotions were given to Police-sub-Inspectors to the post of Police Inspectors as per the gradation list of 1980, the petitioner was superseded by his about 8 juniors. The petitioner's name figured at serial no. 581 in the said gradation list and juniors to him at serial nos. 582 to 586 and 590 to 592 were promoted. There was no reason for the respondents to bypass the claim of the petitioner while superseding his juniors to the post of Police Inspector. The only apprehension in the mind of the petitioner was about adverse remarks communicated to him by the authority for the year 1982-83. Against these adverse remarks, on 04.07.1983, the petitioner made a representation to the concerned authority. An order was passed by the respondent authority on 19.10.1983 whereby the first remark about his

nature was expunged whereas two other remarks regarding his capacity to shoulder responsibility and his refusal to obey the orders of his superiors remained as they were in the confidential report. Pursuant to the said adverse remarks, in the departmental inquiry, the said remarks regarding his refusal to obey the order for attending security for Asian Games was not proved and for other two charges, one increment for a period of three years was withheld and hence, nothing remained against the petitioner in the year 1984. It is, therefore, submitted that there was no justification with the respondent authority to supersede the petitioner while promoting his juniors in the year 1985.

5.It is further submitted that the respondent authority has published the list of Police-Sub-Inspectors who have been given promotion in the year 1987 by an order dated 07.09.1987 and in

the said order, the petitioner's name did not figure anywhere. One Mr. N.G. Patel who was at serial no. 328 in the revised gradation list of 1987 has got promotion to the post of Police Inspector bypassing the petitioner who figured at serial no. 320 in the said revised gradation list of 1987. The petitioner has, therefore, prayed for quashing and setting aside the promotion list dated 07.09.1987 being violative of the criteria of seniority-cum-merit as per the rules and also violative of Articles 14 & 16 of the Constitution of India.

6.It is also stated that several persons having adverse remarks have been given promotions. The petitioner has also given names of such persons in the petition. It is, therefore, submitted that the petitioner was discriminated and his name was not considered by the respondents. As per the guidelines issued by the State Government, the position of law is very clear

with regard to the employees against whom departmental inquiry is pending. As per the settled position of law, case of such an employee is to be considered by the Departmental Selection Committee and the result thereof has to be put in a sealed cover and it has to be opened after the inquiry is over. If he is exonerated in the inquiry or acquitted in prosecution, then such an employee has to be promoted giving him deemed date of promotion as if no inquiry was there with all consequential benefits. However, nothing of this sort was done in the case of the petitioner and the petitioner's case was neither considered nor the result was put in the sealed cover by the Departmental Selection Committee. It is, therefore, in gross violation of the mandate issued by the State Government.

7.Ms. Sonal Shah, learned advocate appearing for Mr. Y.N. Oza, learned senior counsel for the

petitioner has submitted that the petitioner was denied promotion mainly on account of adverse remarks. While denying promotion to the petitioner in the year 1985, no proper procedure has been followed by the respondent authorities. She has further submitted that the criterion laid down have not been followed while denying promotion to the petitioner. In support of her submissions, she relied on the decision of this Court in the case of *Union of India and Another V/s. Ajitkumar Singh, 45 (2) G.L.R. 952* wherein it is held that when adverse remarks were expunged by the competent authority, the petitioner was entitled to promotion with retrospective effect from the date his juniors were promoted. The Court further held that the net effect would be that all the adverse confidential report has to be read in entirety and it was not open to the petitioner to consider expunged remarks in isolation and deny promotion to the respondent.

8.She has further relied on the decision of this Court in the case of *Mansinh Kakusinh Udavat V/s. District Superintendent of Police & Ors., 1996 (1) G.C.D. 842 (Guj.)* wherein it was found that the petitioner was punished with minor punishment of censure and there was drill for three days on account of riding bicycle without light and for reporting late. These punishments were highly stale and after the period of six years, same could not be considered to the prejudice of his candidature for the purpose of promotion to the higher post and the petitioner's performance in the investigation which is the basic job in the police department was found to be commendable in the year 1977 which is in close proximity for the year 1978 in which, promotions were accorded to his juniors. The Court, therefore, held that the petitioner's candidature was not considered for promotion to the post of Head Constable in

accordance with law when the promotions were made available in the year 1978.

9.She has further relied on the decision of this Court in the case of *S.R. Bhatt V/s. State of Gujarat, 1993 (1) G.L.H. 646* wherein the respondent – State was directed to consider the case of the petitioner regardless of the alleged adverse entries in the Annual Confidential Reports for inclusion of his name in the select list from the date when his junior Mr. Pujara's name was included in the select list prepared by the Selection Committee in the meeting held on 28.03.1978, and also to consider all the consequential monetary and service benefits as if what would have been available to him had his name been included in the select list prepared by the Selection Committee.

10.She has further relied on the decision of this

Court in the case of *G.B. Shephard V/s. State of Gujarat & Ors., 21 (2) G.L.R. 68* wherein the Court has taken the view that non-selection for promotion on ground of impending inquiry is violative of Article 16 of the Constitution of India.

11.So far as the challenge on the ground of proper procedure having not been followed while denying the promotion to the petitioner is concerned, she has relied on the decision of the Hon'ble Supreme Court in the case of *Union of India V/s. K.V. Jankiraman, AIR 1991 S.C. 2010* wherein it is held that it is only when a charge-memo in a disciplinary proceedings or a charge-sheet in a criminal prosecution is issued to the employee it can be said that the departmental proceedings / criminal prosecution is initiated against the employee. The sealed cover procedure is to be resorted to only after the charge-memo/charge-sheet is issued. The

pendency of preliminary investigation prior to that stage will not be sufficient to enable the authorities to adopt the sealed cover procedure. The Court further held that the promotion etc. cannot be withheld merely because some disciplinary/criminal proceedings are pending against the employee. To deny the said benefit, they must be at the relevant time pending at the stage when charge-memo/charge-sheet has already been issued to the employee.

12.She has further submitted that proper criterion have been laid down in the Govt. Resolution dated 28.03.1982. However, the said Resolution has not been produced before the Court. For this purpose, she relied on the decision of this Court in the case of *B.B. Dwivedi V/s. State of Gujarat & Ors., 41 (4) G.L.R. 3312* wherein it is held that it is well settled that the assessment of the Departmental Promotion Council on the basis of material

before it is the subjective opinion of the Committee and is not liable to be challenged by way of judicial review. It is equally well settled that where a decision is founded on subjective satisfaction of an authority, still it has to be founded on same existing objective material having relevance to formation of opinion. The formation of subjective material cannot be founded on non-existing material or the material which cannot be taken into consideration. The adequacy or sufficiency of the material for formation of opinion which is subjective in nature, may not be relevant for the purpose of judicial review, but the existence of the material has to be shown if the validity of consideration depending on subject satisfaction is challenged on that ground.

13.She has further relied on the decision of this Court in the case of *Thakorlal M. Khambholja*

V/s. The State of Gujarat and Others, 1984 G.L.H. (U.J.) 26 wherein it is held that unless the petitioner was found to be positively unfit, he could not be denied promotion. Once it was found that the petitioner was not found positively unfit, his juniors could not have been promoted overlooking his claim.

14.Lastly, she has relied on the decision of this Court in the case of *Bimal Motilal Rajvanshi V/s. State of Gujarat and another, 1997 (1) G.L.H. 354* wherein it is held that in the case of promotion by merit-cum-fitness, it is positive merit of the candidate which is required to be seen and not his fitness for the post. The adverse remarks posted in the confidential dossier therefore cannot be only basis for denying promotion to an individual. When admittedly, the criteria is proved merit and fitness it is required to be found out by the Departmental Promotion Committee that the

candidate was not possessing requisite merit and efficiency for promotion to the post of Police Inspector and his unfitness was not to be seen by reference to his service record of confidential dossier.

15.Based on the aforesaid authorities and the settled legal position, Ms. Sonal Shah, learned advocate appearing for the petitioner has prayed for the direction to the respondent authorities to grant the deemed date of promotion w.e.f. 1985 as the juniors to the petitioner were promoted in that year.

16.Mr. L.B. Dabhi, learned Assistant Government Pleader appearing for the respondents has submitted that during the pendency of this petition, by virtue of an order passed in September 1991, the petitioner was granted deemed date of promotion w.e.f. 07.09.1987. The petitioner retired on 31.03.2002 as Deputy

Superintendent of Police. He has, therefore, submitted that nothing survives in this petition. The very fact that the petitioner has not pointed out all these facts before this Court nor has raised any grievance in the year 1991 when the deemed date of promotion was granted to the petitioner w.e.f. 07.09.1987, itself shows that the petitioner was satisfied with the said order of promotion.

17.He has further submitted that even otherwise, while granting promotions, the adverse remarks were not at all taken into consideration. He has pointed out from the affidavit-in-reply that the petitioner has no legal or fundamental right to get promotion to the post of Police Inspector, especially in view of the fact that the criteria for promotion to the post of Police Inspector is on merit. The petitioner has got only limited right of being considered for promotion to the post of Police Inspector.

The petitioner's case was duly considered for promotion to the post of Police Inspector by the Selection Board consisting of Director General and Inspector General of Police, Inspector General of Police (Administration) and Deputy Secretary (Home Department). The said Selection Board did not find the petitioner meritorious enough to be promoted to the post of Police Inspector and, therefore, the petitioner was not promoted to the post of Police Inspector. The criteria for promotion to the post of Police Inspector is not seniority as submitted by the petitioner. It is not correct to state that by not promoting the petitioner to the post of Police Inspector, the respondent authorities have acted in an illegal, malafide or capricious manner. The criteria for promotion to the post of Police Inspector is incorporated in Rule 53 of the Gujarat Police Manual, relevant portion of the said rule is as under :-

"*53*. *Unarmed Inspectors of Police* -

(i) Appointment of Police Inspectors (unarmed) shall be made either :

(i) by promotion of meritorious officers from the ranks of the Police Force in order of merit on the selection list or;

(ii) by direct recruitment.

18.Mr. Dabhi has, therefore, submitted that the criteria for promotion is merit and is not seniority or seniority-cum-merit. Even a Notification issued by respondent No. 2 Government in Home and Civil Supplies Department dated 10.01.1964 also clearly stated that basis for promotion to the post of Police Inspector is merit. The petitioner, therefore, does not have any legal right to get promotion to the post of Police Inspector. Mr. Dabhi has further submitted that the case of the petitioner was placed before the Selection Board when the meetings were held in December 1979, August 1982, February 1984 and February

1986. On all these occasions, the Board consisting of highly responsible Officers had considered the petitioner's case for promotion to the post of Police Inspector. But the Board did not find the petitioner meritorious enough to be promoted to the post of Police Inspector. The persons who were junior to the petitioner were found better than the petitioner and more meritorious and, therefore, they were promoted to the post of Police Inspector. He has, therefore, submitted that since the case of the petitioner was duly considered by the Board, the petitioner should not have any grievance regarding non-consideration of his case for promotion.

19.In support of his submission, Mr. Dabhi has relied on the decision of the Hon'ble Supreme Court in the case of *Dwarka Prasad and others V/s. Union of India and Others, (2003) 6 S.C.C. 535* wherein the Hon'ble Supreme Court has held

that the promotion cannot be claimed as of right.

20.Mr. Dabhi has further submitted that the present petition should be dismissed on the ground of delay and latches as the petitioner is claiming the deemed date of promotion w.e.f. 1985 whereas the petition is filed in 1987. For this proposition, he relied on the decision of the Hon'ble Supreme Court in the case of *A.J. Fernandis V/s. Divisional Manager, South Central Railway and Others, (2001) 1 S.C.C. 240* wherein the application challenging the promotion of another employee after a period of four long years was held liable to be dismissed on the ground of delay and latches.

21.In view of the above submissions, Mr. Dabhi has submitted that no grievance would survive in the present petition and the petition should, therefore, be dismissed.

22.After having heard learned advocates appearing for the respective parties and after having gone through the pleadings of the parties as contained in the petition as well as in the affidavit-in-reply and after having considered various authorities cited before the Court and after having taken into consideration the very special facts of the present case that the petitioner was granted deemed date of promotion w.e.f. 07.09.1987, the Court does not think it just and proper to interfere in the matter. The whole basis of filing this petition is found to be erroneous in this wise that the petitioner was carrying out an apprehension that because of adverse remarks, his case was not considered for promotion. However, looking at the reply, it is made very clear that at no stage, it was stated that because of the adverse remarks, the petitioner's case was not considered for promotion. Everywhere, it was stated that the

petitioner was not found to be meritorious as compared to his juniors to whom the promotions were granted and hence, the petitioner was not granted promotion to the post of Police Inspector. The Court is, therefore, of the view that the respondent authorities have rightly taken into consideration the petitioner's case for promotion in 1991 and granted deemed date of promotion w.e.f. 07.09.1987. Even otherwise, in the whole petition, much emphasis was given on the issue to grant promotion w.e.f. 1987. Though reference was made in the petition for grant of promotion w.e.f. 1985, no material was produced to that effect except by making bald statement or averment in the petition.

23.Looking to the entire facts and circumstances of the case and having due regard to the authorities cited before the Court, the Court is of the view that since the petitioner has

been granted deemed date of promotion w.e.f. 07.09.1987, no interference is called for. The petition is accordingly dismissed. Rule discharged without any order as to costs.

[K.A. PUJ, J.]

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